



**THE ATTORNEY GENERAL  
OF TEXAS**

GERALD C. MANN

XXXXXXXXXXXXXXXXXXXXX  
WILL WILSON  
ATTORNEY GENERAL

AUSTIN 11, TEXAS

Honorable Bascom Giles  
Commissioner, General Land Office  
Austin, Texas

Dear Sir:

Opinion No. 0-3197

Re: Status of application to lease  
where bad check accepted by  
county surveyor for filing fee.

On February 20, 1941, we received your request for  
an opinion on the following matter:

"On January 14, 1941, this office received  
a twenty-one page application and a \$100.00 fil-  
ing fee, to lease an area of alleged vacant un-  
surveyed School Land in Brazoria and Galveston  
Counties, from Mr. Dan Purvis of Alice, Texas.

"This application was in the form prescribed  
by law, and bore the certificates of the County  
Surveyors of Galveston and Brazoria Counties to  
the effect that the same had been filed and re-  
corded in their offices.

"The application and filing fee were ac-  
cepted by this office and set up on our records  
as M. A. 35699, and as yet no further action  
has been had thereon by this office.

"On February 13, 1941, a letter was received  
from Mr. Adriance Munson, County Surveyor of  
Brazoria County, (Photostatic copy of which is  
attached hereto) in which he stated that he had  
been given a check for \$5.00 by Mr. Purvis to  
cover the cost of filing this application, on  
January 4, and that on January 21, before he  
had copied the instrument into his records, the  
check was returned unpaid, and requesting author-  
ity from this office to mark the application  
"cancelled."

"\*\*\*

"I would appreciate the benefit of your opinion as to the validity of this application, and the proper steps which should be taken by this office and by the County Surveyor, Mr. Munson, in regard to it."

Since you state that the application was in the form prescribed by law we assume that your question as to the validity of this application is based solely upon the circumstances surrounding the filing of same with the County Surveyor of Brazoria County.

It is the opinion of this department that the County Surveyor of Brazoria County must record the application in question in a book kept by him for that purpose and the fact that the check given for the payment of the filing fee was returned unpaid does not authorize him or you to make the application cancelled.

Article 5421c, Section 6, Subsection c, Vernon's Annotated Statutes, provides as follows:

"Any applicant who claims that a vacancy exists and desires to lease or purchase same shall file in duplicate with the County Surveyor of the county in which any part of the land is situated a written application to purchase or lease same under the provisions of this Act. \* \* \*

"Contemporaneously with the filing of the application, the applicant shall pay to said surveyor a filing fee of five Dollars (\$5). The surveyor shall mark on the original and duplicate the exact hour and date of filing, shall return one application to the applicant and shall record the other in a book to be kept by him for that purpose. The application which is returned to the applicant shall, within ten (10) days after the date of filing with the surveyor of the county, be filed with the Commissioner who shall note thereon the date of filing. Applicant shall also pay

a filing fee of One Hundred Dollars (\$100) to the Commissioner. Failure to file the application with the Commissioner within the time fixed, and to pay the filing fee, shall be a waiver of all rights under the application. As between applicants, priority shall date from the time of filing with the surveyor. \* \* \*

It will be seen from the reading of the above statute that the Five Dollar filing fee is a fee allowed the county surveyor for his services in filing and recording, the application which he could demand in legal tender before accepting the application for filing and recording, but he may accept a check or even do his services free insofar as the validity of the filing is concerned. Once he has accepted it for filing and recording the rights acquired by filing immediately attach and the county surveyor cannot disturb or destroy them. The provision in the above act "failure to file the application with the Commissioner within the time fixed, and to pay the filing fee, shall be a waiver of all rights under the application" refers to the filing fee of One Hundred Dollars to be paid the Commissioner of the General Land Office and not the Five Dollar filing fee to be paid to the County Surveyor.

In dealing with the recording of a deed by the County Clerk in the case of American Exchange Bank of Dallas, et al v. Colonial Trust Company, 186 S. W. 361, the court had the following to say:

"\* \* \*. Therefore, if he has the legal right to refuse to receive an instrument in his official custody unless the fees for recording be paid him in advance it must, it is thought, be immediately or seasonably exercised upon the tender of the instrument for record. By so doing and refusing to receive the instrument in his official custody for record the legal effect would not attach of being deemed filed for record. But, when the clerk receives and retains the instrument in his official custody, it is filed within the meaning of the law. It is not intended by the article to clothe the clerk with the power of making or defeating rights respecting registration. \* \* \*. If the clerk, though,

receives and retains the instrument in his official custody awaiting payment of his fees, he, in legal effect waives his personal privilege of requiring payment, and must file and record, as required by law, the instrument so received. \* \* \* The clerk's indorsing on the deed of trust the date of its reception, and holding and retaining it in his official custody with intention to actually enter of record if the recording fee was remitted, would constitute, it is thought, the instrument as filed within the meaning of the law. \* \* \*

See also Carlisle & Company v. King, et al, by the Supreme Court, in 133 S. W. 241, on rehearing 133 S. W. 864. We note in your letter that the application received by your office bore a certificate from the County Surveyor of Brazoria County that same had been filed and recorded in his office brining this situation clearly within the American Exchange National Bank case, supra.

Sincerely yours

ATTORNEY GENERAL OF TEXAS

By

D. D. Mahon  
Assistant

DDM:mp/PAM

*Mann*  
APPROVED 12, 1941  
GERALD C. MANN  
ATTORNEY GENERAL OF TEXAS  
APPROVED OPINION COMMITTEE  
BY BWB, CHAIRMAN